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No. 85591-9
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LYNETTE KATARE,

Respondent,

vs.

BRAJESH KATARE,

Petitioner.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY ROBERTS

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Lynette Katare submits this Answer to Brajesh Katare's petition for review pursuant to RAP 13.4(d).

II. RESTATEMENT OF THE CASE

The foreign travel limitations on the father's residential time with the children were entered after two trials and carefully crafted to reasonably prevent the children's abduction to a non-Hague country from which they could not be retrieved. The father has unsuccessfully appealed these restrictions three times, and this case returns to this Court over seven years after the petitioner first sought review of the trial court's order restricting him from removing the parties' children from the United States. This Court should deny review and put an end to this abusive litigation.

A. The 2003 Trial And Ruling.

The parties participated in a five-day trial to dissolve their marriage and establish a parenting plan for their children, then ages two and three. During trial, the trial court considered evidence that the major dispute between the parties, which culminated in the mother filing a petition for dissolution, was the father's insistence that the family relocate to India over her objection. The father told the mother and third parties that he intended to take the children to

India without the mother, that he could hire a nanny to "replace" the mother, and that his mother and sister-in-law could raise the children in India. (I RP 75, 119, II RP 78, 144-45, 147-48; CP 235-41; Ex. 142, 143 (2003 Trial)) The father told the mother she had "no choice" about whether he could take the children to India. (I RP 113) The father sought to obtain passports and "PIO cards" that would allow the children to reside in India for up to fifteen years. (I RP 75, 125-26)

The father made threats to take the children to India on at least eight occasions. (See III RP 213) The parenting evaluator testified that, based on interviews with both parents and third parties, the mother's fears that the father might abduct the children were justified. (II RP 103, 111, 144-45, 147-48) The evaluator testified that she had her own "residual discomfort" whether the father would abduct the children. (II RP 135-36)

After considering all of the evidence, including the father's denials that he ever threatened to abduct the children, the trial court placed conditions on the father's exercise of residential time based on a finding that "India is not a signator to the Hague Convention on International Child Abduction . . . under the circumstances of the

case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting and the consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children." (CP 168, Findings of Fact (FF) 2.20.1, 2.20.2) The trial court in its oral ruling explained the need to impose restrictions because of its concern regarding the possibility, and the "incredibly serious" consequences, of abduction:

I gave a long and careful consideration to the issue of the risk of abduction and confess today being concerned about this. I'm not persuaded, based on all the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katare presents a serious threat of abducting the children. Nonetheless, if I'm wrong on this the consequences are incredibly serious and I'm mindful about that. I'm going to impose some restrictions in the parenting plan that will be designed to address this issue, and I hope that everything has been brought to this Court, which I think indicates that, there is not a serious risk of abduction turns out to be the truth.

(7/7/03 RP 10)

Despite entering findings warranting its foreign travel limitations, the trial court initially declined to base its restrictions on RCW 26.09.191. (CP 171) On October 15, 2003, the father appealed.

B. *Katare I.*

Division One's decision in the first appeal was published at 125 Wn. App. 813, 105 P.3d 44 (2004). (Petition, Appendix E) Division One held that the trial court's findings supported its foreign-travel restrictions under RCW 26.09.191(3)(g), but that the trial court's "form" finding that RCW 26.09.191 "does not apply" created an ambiguity:

Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court's discussion of the risk of abduction, the findings it made and the limitations it imposed. Except for the inconsistent entry that states the RCW 26.09.191 basis for restrictions does not apply, the court's findings support restrictions under RCW 26.09.191(3)(g).

125 Wn. App. at 831, ¶ 39. Division One told the trial court to clarify whether it intended to impose restrictions under RCW 26.09.191:

Rather than speculate, we remand for the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate make the necessary findings.

125 Wn. App. at 831, ¶ 39.

This Court denied both parties' petitions for review. 155 Wn.2d 1005, 120 P.3d 577 (2005).

C. 2005 Remand Hearing And Ruling.

On remand the trial court reiterated its earlier findings and clarified its intent to impose restrictions under RCW 26.09.191(3)(g). The trial court made an express additional finding that the risk of abduction was sufficient to justify limitations under RCW 26.09.191(3)(g):

OTHER FACTORS (RCW 26.09.191(3)). Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of the case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, and the fact that India is not a signator to the Hague Convention on International Child Abduction, the consequences of such an abduction are so irreversible as to warrant limitation on the husband's residential time with the children. *The risk of abduction is a factor justifying limitations under RCW 26.09.191(3)(g).*

(Ex. 7, emphasis added)

The father appealed again.

D. *Katare II.*

Division One filed an unpublished decision in the father's second appeal on October 1, 2007. ***Marriage of Katare***, 140 Wn. App. 1041 (2007). Division One stated that "by basically restating its earlier findings as the justification for imposing limitations . . . the

trial court does not resolve the ambiguity and does not expressly address whether the evidence supports the limitations under RCW 26.09.191(3)." (Petition, Appendix F 3) Addressing an argument first made by the father in the second appeal, Division One also stated that the trial court's findings did not expressly address the best interests of the children. (Petition Appendix F 3) Division One directed the trial court on remand to once again address whether parenting plan limitations were justified under RCW 26.09.191(3):

Because the trial court's findings in the parenting plan do not expressly address whether the parenting plan limitations are justified under RCW 26.09.191(3), we remand to the trial court.

(Petition, Appendix F 1)

E. The 2009 Trial And Ruling.

Because it had been six years since the last trial, after the second appeal the court scheduled a two-day trial to consider more current evidence. After this second trial, the trial court largely re-affirmed its findings from the 2003 dissolution trial and found that it was in the best interests of the children to have their residential time with the father limited to the United States. (CP 153)

The trial court noted that it considered "credible" evidence of the father's threats to abduct the children to India in the testimony

of the mother, the parenting evaluator, and third-party affidavits that the father had offered as evidence during the 2003 trial. (CP 153, Ex. 142, 143 (2003), II RP 78) The trial court also relied on evidence that the father appeared to be planning to unilaterally remove the children from the United States during the dissolution proceedings by attempting to obtain information that would have allowed him to obtain travel documents for them. (CP 153-54; I RP 75, 125-26) Based on this evidence, the trial court found there was a "sufficient risk of abduction to warrant a geographical limitation on the father's residential time with the children." (CP 160) Once again noting that the consequences of abduction to India, a non-Hague Convention country, were "incredibly serious and irreversible," the trial court found that "the risk of abduction by the father and the best interests of the children justify limitations under RCW 26.09.191(3)(g)." (CP 153-54)

Based on evidence elicited in the 2009 remand trial, the trial court also found that the current risk of abduction had not "abated," but had "now increased:"

The risk of abduction has not abated, and based on evidence presented at the hearing on remand, is seen more clearly to have been strong at the time of the original trial, and perhaps to have now increased.

(CP 154) In concluding that the risk of abduction had not "abated," the trial court expressed concern that the father's "extreme anger" "heightens the risk to the children." (CP 154) The trial court was particularly concerned that the father could not control his "utter disdain" for the mother, and expressed concern that the father's "extreme anger" and his demonstrated poor judgment "could manifest itself by an abduction of the children:"

From the emails between the parties after the first trial, it is evident that the father still harbors resentment against the mother, which could manifest itself by an abduction of the children. The father's emails demonstrate extreme anger, abuse, unreasonableness, and poor judgment. This is of particular concern given that he knew that the e-mails would likely be presented in court. He addressed the mother in a condescending and humiliating manner, indicating utter disdain for the mother. This continuing conduct, especially when the father is aware of the court's involvement, heightens the risk to the children.

(CP 154)

Based on this new evidence, the trial court found that the father's prior threats to abduct the children and his continuing "pattern of abusive, controlling, punishing behavior" places the children at risk of being abducted. (CP 156) "The passport and

travel restrictions set forth in the parenting plan are reasonably calculated to address this identified harm." (CP 156)

The trial court also expressed its continuing concern about the serious consequences if the children are abducted. The trial court found that "the children, now ages 8 and 7, are too young to seek assistance in the event that they are improperly retained by their father or otherwise unable to return to their mother. This is especially true if the children are taken to a foreign country such as India." (CP 155) The trial court found that "it is not in the best interest of the children to allow them to travel with their father outside the United States such that they might be put in a position of being kept from returning to the United States. The father's testimony and conduct alone leads the court to this conclusion, regardless of the mother's testimony." (CP 155) The trial court further found that "it is in the best interests of the children to have their residential time with their father in the United States. The father's time with the children is not now limited to Florida, and his concerns about not being able to expose the children to his culture have been ameliorated by the elimination of other restrictions on his time with the children." (CP 156)

The father once again appealed. (CP 158)

F. *Katare III.*

Division One filed its unpublished decision in the father's third appeal on January 10, 2011. ***Marriage of Katare***, 159 Wn. App. 1017 (2011). The court held that there was substantial evidence to support the trial court's imposition of foreign travel restrictions on the father's residential time with the children, including its finding that the father made credible threats to abduct the children, and that based on the new evidence presented on remand, the risk of abduction had not abated. (Petition, Appendix A 18) The court held there was substantial evidence to support the trial court's finding that the father's poor judgment, extreme anger, unreasonableness, utter disdain for the mother, and resentment "could manifest itself by an abduction of the children." (Petition, Appendix A 18) The court also held that substantial evidence supports the trial court's findings that the father's "pattern of abusive, controlling, punishing behavior puts the children at risk of being used as the tools to continue this conduct." (Petition, Appendix A 18)

While the court held that the trial court had abused its discretion in considering testimony from Michael C. Berry, determining that his testimony was akin to inadmissible "profiling evidence," it found that any error was harmless because the trial court did not adopt Mr. Berry's analysis and found that the father's "testimony and conduct alone" supported the foreign travel restrictions. (Petition, Appendix A 23-25)

The father petitions for review.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court Of Appeals Properly Affirmed The Trial Court's RCW 26.09.191 Order Because The Trial Court Found A "Nexus" Between The Father's Conduct And The Restricting Factor That Gave Rise To The Limitations Imposed.

RCW 26.09.191(3)(g) allows the trial court to "preclude or limit any provisions of the parenting plan" if it finds that a parent's conduct is adverse to the best interests of the children. In this case, while the father complains that the foreign travel restrictions are contrary to the children's best interest (Petition 17), in fact, the trial court found – and the father did not challenge – that it would not be in the children's best interests if they were removed from the United States and kept from returning. (CP 155) The trial court found that the children, ages eight and seven, "are too young to

seek assistance in the event that they are improperly retained by their father or otherwise unable to return to their mother." (CP 155) These unchallenged findings are verities on appeal. *Marriage of Possinger*, 105 Wn. App. 326, 338, 19 P.3d 1109, *rev. denied*, 145 Wn.2d 1008 (2001) (unchallenged findings are verities). This Court should deny review of the Court of Appeals decision affirming a fact-based decision addressing parenting issues, crafted by the trial court in the best interests of the children.

1. Review Is Not Warranted Under RAP 13.4(b)(2) Because The Court Of Appeals Decision Is Consistent With Other Appellate Court Decisions.

The father claims that review is warranted because *Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006) and *Marriage of Wicklund*, 84 Wn. App. 763, 932 P.2d 652 (1996) prevent a trial court from imposing limitations "absent 1) adverse parental conduct that is adverse to the child's best interests; and 2) substantial evidence that establishes a nexus between the parent's conduct – the actual conduct that occurred that purportedly gives rise to the need for restrictions – and an actual or likely adverse impact on the children." (Petition 13) But that is exactly what occurred here. There was substantial evidence to support the trial

court's finding that the father's conduct – his threats to abduct the children – was adverse to the children's best interests. There was also substantial evidence that establishes a "nexus" between the parent's conduct – the abduction threats – and an actual or likely adverse impact on the children – the abduction risk. (See Petition, Appendix A 2, 18, 19-20) The Court of Appeals properly held that the findings "justified the trial court's decision to impose foreign travel restriction as reasonably calculated limitations [in the parenting plan] in the best interests of the children." (Petition, Appendix A 20) This is consistent with the holdings of **Watson** and **Wicklund** as described by the father in his petition.

The father narrowly focuses on the trial court's findings expressing concern about his "resentment" and anger towards the mother, and his "poor judgment," (Petition 14) claiming that since the emails on which these findings are based were directed toward the mother, and not the children, it could not have affected the children. But the trial court's concern was that the father could act out his resentment towards the mother by abducting the children, which indisputably would have an adverse impact on the children. (CP 154) In any event, leaving aside the father's unsupported

claim that one parent's "abusive, controlling, punishing behavior" towards another parent will have no impact on the children, these were not the only reasons that the trial court imposed RCW 26.09.191 limitations on the father. See **Marriage of Burrill**, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003) (mother's abusive use of conflict against the father created a "danger of serious psychological damage to the children" warranting RCW 26.09.191 limitations on the mother's residential time).

Based on evidence presented during the first trial, the trial court found that the father threatened to abduct the children and attempted to obtain documentation that would have allowed him to remove the children from the United States. (CP 153-54) This "conduct" caused the restricting factor – the "risk of abduction" that necessitated the limitations imposed in the parenting plan. **Watson**, 132 Wn. App. at 233, ¶ 31 ("a finding under RCW 26.09.191(3) must be supported by substantial evidence that the parent's 'involvement or conduct' caused the restricting factor").

As part of the second trial, the trial court also found that the father "demonstrate[d] extreme anger, abuse, unreasonableness,

and poor judgment,” and that the risk of abduction had not “abated.” (CP 154) Thus, it was not just the emails from the father to the mother and his expressed resentment towards the mother that was the “conduct” that gave rise to the “restricting factor” – the risk of abduction. Instead, it was the father’s prior threats to abduct the children coupled with his continued resentment towards the mother, which the trial court found could “manifest itself by an abduction of the children.” (CP 154) This is the nexus between the father’s conduct and the risk of abduction that justifies the limitations in the parenting plan, which are wholly consistent with *Watson* and *Wicklund*.

2. Review Is Not Warranted Under RAP 13.4(b)(3) Because The Restrictions Imposed Were Tailored For This Individual Family And Their Circumstances. Therefore, The Unpublished Decision Is Not Of Substantial Public Interest.

The father complains that the Court of Appeals unpublished decision is of substantial public interest because it is “important” to “thousands of [other parents] born abroad who are now U.S. Citizens and parents in Washington State.” (Petition 11) But contrary to the father’s claims in the Court of Appeals and in this Court, the trial court did not impose restrictions on the father solely

because he was born in a foreign country that is not a signatory to the Hague Convention on International Child Abduction. (Petition 11) Instead, the restrictions were imposed because he threatened to abduct the children, pursued the means to do so, and still – over seven years after the parties' divorce – showed "extreme anger, abuse, unreasonableness, and poor judgment." (CP 153-54)

That the father was originally from a non-Hague country was not the sole reason for the foreign travel restrictions, but it did properly inform the court as to what restrictions might be necessary to prevent any abduction of the children. The foreign travel restrictions imposed by the trial court were tailored for this particular family based on this father's conduct. Contrary to the father's claim, no other foreign-born parent will be affected by these limitations. Thus, the Court of Appeals unpublished decision affirming these restrictions are not of "substantial public interest" and review is not warranted under RAP 13.4(b)(3).

B. The Court Of Appeals Properly Concluded That Any Consideration Of "Profile Evidence" Was Harmless Since The Trial Court Found That Its Imposition Of Foreign Travel Restrictions Was Based On The Father's "Conduct And Testimony Alone."

The Court of Appeals properly held that admission of "risk factors and profiles" for parental abduction was harmless when the trial court did not adopt the risk factor analysis in making its decision to impose RCW 26.09.191 limitations on the father. (Petition, Appendix A 23-24) The court properly noted that the trial court "did not identify any of these factors as creating a risk of abduction, and it appears, largely disregarded Berry's opinion about which risk factors applied." (Petition, Appendix A 24) Instead, the trial court found that the father's "testimony and conduct alone" supported the foreign travel restrictions. (Petition, Appendix A 24)

The father fails to provide any substantive argument as to why the Court of Appeals decision should be reviewed on this issue. Instead, without citation to any authority, the father asserts that this Court should "declare that, whenever a Washington trial court relies on racial profiling evidence to impose restrictions, the usual deference to the trial court's decision will be subjected to the strictest scrutiny to insure they are not discriminatory, and do not

appear [] to be irredeemably tainted by racial stereotyping, which would require vacating the restriction at issue and remanding for further proceedings before a new judge." (Petition 20)

But the "risk factors and profiles" that were admitted at trial was not akin to *racial* profiling. The twelve risk factors that were presented were race-neutral. (See Respondent's Brief, Appendix A) Among other factors, the risk factors included whether the parent threatened to abduct or had previously abducted the children; parent engaged in planning activities; there is history of domestic violence; parent has prior criminal record; parent is paranoid or delusional; and parent is a sociopath. (See Respondent's Brief, Appendix A) The only factors that might be even remotely related to race were the risk factors that the parent has "strong ties to another country" or has "family living in another country." (See Respondent's Brief, Appendix A)

But these two factors coupled with the other ten race-neutral factors is not akin to racial profiling, nor did the Court of Appeals hold that it was. If this Court grants review of the Court of Appeals decision, however, it should also review the portion of the decision holding that the trial court erred, albeit harmlessly, in admitting

testimony from Michael Berry. (Petition, Appendix A 23-24) Mr. Berry's testimony largely recounted "red flags" and "risk factors" of international parental abduction from various literature sources.¹ Courts routinely consider this type of information in making determinations at trial. See e.g. **State v. Ciskie**, 110 Wn.2d 263, 272-273, 751 P.2d 1165 (1988) (relying on treatises describing battered woman syndrome); **Marriage of Pape**, 139 Wn.2d 694, 706, 989 P.2d 1120 (1999) (relying on articles regarding child relocation). These "risk factors," which Division One analogized to "inadmissible profiling evidence," to the contrary are identical to the factors in the statutes of other states addressing parental abduction, as well as the Uniform Child Abduction Prevention Act. (Respondent's Brief, Appendix A)

That the existence of certain factors may be relevant to a determination of whether a parent poses a risk of abduction is not akin to "criminal profiling." (Petition, Appendix A 24) Instead, as

¹ *Accounting for Non-Resident Indian Clients* (2004) (Ex. 11) and *International Parental Child Abduction* (1998) (Ex. 25); 2001 "white papers" from the U.S. Department of Justice (Ex. 27, 28, 33); an April 2008 Report on the Compliance with the Hague Convention by the U.S. Department of State (Ex. 29); a 2007 Family Resource Guide on International Parental Kidnapping by the Department of Justice (Ex. 30); a 2002 Family Abduction and Prevention and Response booklet published by the National Center for Missing and Exploited Children (Ex. 31); and a travel alert issued by the State Department in December 2008.

the prefatory notes to the Uniform Child Abduction Prevention Act state: "family abductions may be preventable through the identification of risk factors." Trial courts are tasked with the important job of making decisions to protect children. The courts should be allowed access to all tools available to assist them in making these decisions. If this Court accepts review it should make clear that a trial court is not prevented from considering relevant risk factors in assessing whether restrictions are appropriate to prevent parental abduction of a child.

IV. CONCLUSION

There is no basis to review the Court of Appeals unpublished decision and this Court should deny review. If it does accept review, the Court should also consider whether the trial court abused its discretion in admitting the testimony of Michael Berry.

Dated this 11th day of March, 2011.

SMITH GOODFRIEND, P.S.

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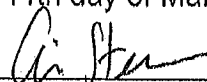
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 11, 2011, I arranged for service of the foregoing Answer to Petition For Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of March, 2011.


Carrie Steen

OFFICE RECEPTIONIST, CLERK

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Dear Clerk:

Attached for filing is the Answer to Petition For Review in *Katare v. Katare*, Supreme Court Cause No. 85591-9. The person filing this answer is Catherine W. Smith, WSBA No. 9542, email address: cate@washingtonappeals.com.

Regards,

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